85-841

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CAROL CURRIE, KATHRYN A. ECKLES
AND
ANNE SELLIN,
Petitioners,

v.

MARION S. BARRY, JR.,
MAYOR, DISTRICT OF COLUMBIA,
THE OLIVER T. CARR COMPANY
AND
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*The assistance of Law Clerk Anne L. Mullins in the preparation of this Petition is gratefully acknowledged.

QUESTIONS PRESENTED

1. When the government abdicates responsibility, may the equitable defense of laches be raised to bar public interest claims of citizen litigants seeking redress for statutory violations properly the subject of actions by the government against which laches may not be raised?

2. Whether a defendant must prove affirmative misconduct on the part of a plaintiff litigating in the public interest for the equitable relief of laches to be applied in suits brought by "private attorneys general"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 14

APPENDIX:

Order of the United States Court of Appeals for the District of Columbia Circuit (Per Curiam) A-1

Order of the United States Court of Appeals for the District of Columbia Circuit (Wright, Wald and Edwards, Circuit Judges) A-2

Opinion of the United States District Court for the District of Columbia (Pratt, J.) A-3

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612 (1975) 9

Asbury Park Press, Inc. v. Woolley, 161 A.2d 705 (N.J. 1986) 10

Citizens Concerned about Trident v. Schlesinger, 400 F.Supp. 454 (D.D.C. 1975) 12

Citizens to Preserve Overton Park v. Volpe, 201 U.S. 402, 91 S.Ct. 814 (1971) 9

Clark v. Community for Creative Nonviolence, _____ U.S. _____, 104 S.Ct. 3065 (1984) 10

Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731 (D.Conn. 1972) 13

Downey v. United States, 91 F.2d 223 (D.C. Cir. 1980) 8

Environmental Defense Fund v. Alexander, 614 F.2d 474, 479 (5th Cir. 1980) 11, 12

Foundation on Economic Trends v. Heckler, 587 F.Supp. 753, affirmed in part, vacated in part, 756 F.2d 143 (D.C.Cir. 1984) 11

Galliher v. Caldwell, 145 U.S. 368 (1982) 11

Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917 (D.C. 1980) 10

Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938) 8

Gull Airborne Instruments, Inc. v. Weirberger, 694 F.2d 838 (D.C. Cir. 1982) 11

Newman v. Piggie Park Enterprise, Inc., 390 U.S. 400, 88 S.Ct. 964 (1968) 9

Save Our Wetlands, Inc. v. United States Corp. of Engineers, 549 F.2d 1021 (5th Cir. 1977) 12

Sierra Club v. Morton, 405 U.S. 727 (1972) 12

United States v. County Board of Arlington County, 487 F.Supp. 137 (E.D.Va. 1979) 8

United States v. Hoar, 26 Fed. Cas. 329, No. 15373, 2 Mason 311 8

United States v. RePass, 688 F.2d 154 (2nd Cir. 1982) 8

United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978) 8, 11

United States v. S.C.R.A.P., 412 U.S. 669 (1973) 12

United States v. Summerlin, 310 U.S. 414 (1940) 8

Utah Power and Light Co. v. United States, 243 U.S. 389 (1917) 8

Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7 (D.C. 1978) 10

Other Authorities

The District of Columbia Self Government and Governmental Reorgnaization Act (Home Rule Act) 87 Stat. 774, Pub. L. 93-198, D.C. Code, Section 1-201 *et seq.* 3, 6

The Building Heights Limitation Act of 1910, 36 Stat. 452, 455 3

Schedule of Heights Amendment Act of 1979, D.C. Law 3-43 ..... 2, 6, 7, 9

16 U.S.C. § 1 10

28 U.S.C. § 1254 2

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CAROL CURRIE, KATHRYN A. ECKLES
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MARION S. BARRY, JR.,
MAYOR, DISTRICT OF COLUMBIA,
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THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Carol Currie, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States District Court for the District of Columbia entered in this proceeding on April 25, 1985.

OPINIONS BELOW

The opinion of the trial court of April 25, 1985 is unreported but reproduced and attached as an Appendix at A-3 to A-9. The United States Court of Appeals for the District of Columbia Circuit granted respondents summary affirmance without written opinion.

JURISDICTION

The judgment of summary affirmance of the trial court's order was entered by the United States Court of Appeals for the District of Columbia Circuit on July 11, 1985 (Appendix A–2). The Court of Appeals denied a timely petition for rehearing *en banc* on September 13, 1985 (Appendix A–1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

Petitioners in this case are residents of the District of Columbia who challenge the legality of an amendment to the Schedule of Heights of Buildings Adjacent to Public Buildings, which was enacted by the Council of the District of Columbia in 1979. The amendment permitted the construction of a single building (in two separate phases: Phase I, completed in 1983, and Phase II, recently under construction) known as Metropolitan Square, fronting on 15th Street between F and G Streets, N.W., to a height of 130 feet after a 35 foot setback from the 15th Street building line.

Petitioners' cause of action has been barred by the defense of the doctrine of laches, upon which respondents were granted summary judgment on April 25, 1985. The defense of laches, upon which respondents were granted summary judgment on April 25, 1985. The and so, is not involved in this part of the suit. The building is jointly owned and being constructed by intervenors The Equitable Life Assurance Society of the United States and Square 224 Associates, a limited partnership of which intervenor, The Oliver T. Carr Company (Carr) is the general partner.

Prior to the amendment (D.C. Law 3–43, effective December 29, 1979), for over sixty years the federal height limitation on 15th Street, N.W., between Pennsylvania and G Streets across from the Treasury Building, had been 95 feet.

In 1910 Congress passed the Building Heights Limitation Act (36 Stat. 452, 455) and codified maximum building heights throughout the District of Columbia and delegated authority to the presidentially appointed District of Columbia Board of Commissioners to establish in law lower building height limits near federal buildings. The purpose of this grant of authority was to protect the environs of important federal historic buildings in the nation's capital. Action by the Commissioners resulted in the creation of a "Schedule of Heights of Buildings Adjacent to Public Buildings." Fifteen separate zones were created within the monumental core protecting such federal buildings as the White House, the Treasury Department Building, the U.S. Supreme Court Building and the House and Senate office buildings. In 1912 a lower height limit was established for 15th Street, across from the Treasury Building which is one of four such districts within the White House Precinct.

Petitioners contend that the District of Columbia was without authority to amend the Schedule of Heights and thus without authority to permit the construction of Metropolitan Square in excess of 95 feet because the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), D.C. Code Section 1-233(a)(6) (1981), specifically bars the local government from regulating federal height limitations in the District of Columbia, specifically including the areas covered by the Building Heights Schedule.

Petitioners also contend that not only does the Home Rule Act specifically bar the local government from changing the height limit in the area in dispute, but that the evidence shows that the respondents knew or should have known this fact, yet they proceeded regardless.

On July 27, 1979 Carr wrote a letter to James O. Gibson, Assistant City Administrator for Planning and Development, in which Carr agreed to save the facade of the Keith-Albee building in exchange for D.C. Council

action to amend the Building Heights Schedule to permit a 130-foot building on 15th Street, and receipt of a written statement from the Department of the Interior agreeing it would not object to an amendment to the Height Schedule. This demand was made less than two months after an assistant solicitor of the Department of the Interior, which agency exercises jurisdiction over the park land within the White House Precinct, wrote the Deputy Corporation Counsel of the District of Columbia to inform him of his legal opinion that the Council had no authority under the Home Rule Act to amend the Building Height Schedule.

Carr also demanded in his July 27th letter that the National Capital Planning Commission (NCPC) pass a resolution that it would support or not oppose the proposed Council action to amend the Building Heights Schedule. NCPC is the federal agency responsible for protecting the federal interest in the nation's capital which includes federal building height laws, and the security of the White House and the President. NCPC has the responsibility of informing affected federal agencies of proposed private development within the nation's capital and serves as the coordinating agent for the deliberation of issues affecting the operations of the federal government in the nation's capital.

Two weeks prior to Carr's demand, the professional planning staff of NCPC issued a report which recommended that the federal government oppose the bill before the D.C. Council to amend the Building Heights Schedule. The report concludes that raising the height limit to 130 feet "would have an adverse environmental and visual impact on . . . the White House Precinct. It would also affect the privacy, setting and security of the White House and its grounds at all times during the year. Its adoption by the District Council would have an

adverse impact on Federal interests in the National Capital."[1]

The members of NCPC were never convened to be informed of, and to deliberate over, the impending violation of two federal laws, the aesthetic damage to the White House environment by a 130–foot building or to consider the alarms raised by the Secret Service.[2] NCPC Executive Director, Reginald Griffith, was in receipt of documents, exhibits below, which identified all of the foregoing concerns and illegalities. The presidentially appointed chairman of NCPC during this period of time was also the supervising architect of Metropolitan Square.

On August 6, 1979, Mr. Gibson wrote Carr that the D.C. Executive Branch would work with the D.C. Council to get a quick amendment of the Building Heights Schedule. In addition, Mr. Gibson promised that "[t]he Executive Branch will oppose actions that would delay, interfere with, or prevent completion of the total Carr

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[1]Memorandum of July 9, 1979, appended to petitioners' complaint in the United States District Court as Exhibit B, at page 8.

[2]Council action increasing the height limit by 35 feet has led to the direct result of Metropolitan Square having an unobstructed view of the White House. As a consequence, petitioners claim, the illegal action of the Council has resulted in the construction of a building having an adverse environmental and visual impact on the White House Precinct contrary to the intent of federal laws. In addition, according to the Secret Service, raising the height limit "would adversely affect the overall security of the White House Complex, and seriously interfere with our ability to provide protection for the President and his family as mandated by the U.S. Congress and the American people . . . . In the event that favorable consideration is given to any of the Carr Company proposals, a situation would be created where a privately owned and operated office complex would have an unobstructed view onto the White House grounds, and this would present an uncontrollable situation from a security standpoint." Letter of October 10, 1979, appended to petitioner's complaint in the United States District Court as Exhibit D.

project, this specifically includes court proceedings, as well as all other actions."[3]

These assurances were made despite the fact that on June 15, 1979 an assistant solicitor of the Department of the Interior wrote to the Deputy Corporation Counsel of the District of Columbia to inform him that the District of Columbia Council did not have authority under the Home Rule Act to amend the Building Heights Schedule. Despite such knowledge, the Executive Branch committed itself to seek passage of a law which the Council clearly had no authority to enact.

On August 21, 1979, in a letter to Mr. Gibson, Carr promised to preserve the facade of the Keith–Albee in consideration of the promises made by Mr. Gibson in his August 6 letter. Carr made this promise despite the fact that Mr. Gibson did not provide the written assurances demanded by Carr from the Department of the Interior and NCPC that they would not object to amendment of the Height Schedule.

On November 2, 1979, District of Columbia Mayor Marion Barry, who is charged with the responsibility to properly execute the Home Rule Act, signed The Schedule of Heights Amendment Act of 1979, D.C. Law 3–43, after being informed of the Secret Service's concern on October 18, 1979.

Construction began on Phase I in December of 1980, after issuance of a construction permit. Soon after the first tenant occupancy of Metropolitan Square in February 1983, the Secret Service stopped the President of the United States from greeting foreign dignitaries at the North Portico of the White House.

On September 10, 1984, Carr was awarded a construc-

[3]Exhibit B to Petition for Rehearing En Banc filed by petitioners in the United States Court of Appeals for the District of Columbia Circuit, point 2 at page 4.

tion permit for Phase II. In October 1984, the petitioners became aware of documents outlining the legal, environmental, and security issues raised by the Department of the Interior, NCPC, and the U.S. Secret Service. Petitioners initiated Freedom of Information Act (FOIA) requests which produced additional documentation. The petitioners promptly thereafter filed this suit on December 17, 1984, at which time construction of Phase II had not begun. In the trial court, petitioners sought a declaration that the enactment of the "Schedule of Heights Amendment Act of 1979" was unlawful, and therefore void, and sought an order requiring defendants to bring Metropolitan Square into compliance with the law.

REASONS FOR GRANTING THE WRIT

I. When the government abdicates responsibility, the equitable defense of laches should not be permitted to be raised to bar public interest claims of citizen litigants seeking redress for statutory violations properly the subject of actions by the government against which laches may not be raised.

This Court should grant certiorari to resolve whether suits in the public interest brought by private parties acting in the stead of the government, i.e., as private attorneys general, may be barred by the doctrine of laches.

Petitioners brought this suit, which seeks to have federal law enforced, for the benefit of the people of the United States. Petitioners are acting as private attorneys general in this suit. The suit, by its nature, is of the type usually brought by the federal government, but in which the federal government has chosen not to join. The court below did not consider that had this case been brought by the federal government, as such suits traditionally are, the claims of the petitioners would not have been barred by the defense of laches.

It is held that the defense of laches is not a bar to a suit brought by a government, especially the United States government, to enforce a public right or protect a public interest. *United States v. Summerlin,* 310 U.S. 414, 416 (1940); *Guaranty Trust Co. of New York v. United States,* 304 U.S. 126, 132 (1938); *Utah Power and Light Co. v. United States,* 243 U.S. 389, 409 (1917); *Downey v. United States,* 91 F.2d 223, 230 (D.C. Cir. 1938); *United States v. RePass,* 688 F.2d 154, 158 (2d Cir. 1982); *United States v. Ruby Co.,* 588 F.2d 697, 704 (9th Cir. 1978); *United States v. County Board of Arlington County,* 487 F. Supp. 137, 141 (E.D. Va. 1979).

In *Arlington County, supra,* the court held that laches did not bar the government's suit (brought at the behest of the Department of the Interior and NCPC) which sought to enjoin construction, already started, of high-rise buildings in Rosslyn, Virginia.

> Although the Government should not have waited until the buildings in question were under construction before bringing this suit — laches, or neglect on the part of Government officials is no defense to a suit to enforce a public right or protect a public interest.

Id.

The government there, as petitioners, in part, do here, contended the high-rise buildings would interfere with various historical and aesthetic components of the nation's capital.

Guaranty Trust Co., supra, 304 U.S. at 132, traces the history of the concept of the government's exemption from laches and finds that, "the source of its [the exemption's] continuing vitality . . . is to be found in public policy now underlying the rule . . . . 'The true reason . . . is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officials.' Story, J. in *United*

States v. Hoar, 26 Fed. Cas. 329, 300, No. 15373."

In his decision below, Judge Pratt determined that the petitioners had standing to bring their action. Petitioners, in seeking the repeal of the District of Columbia Council's amendment, D.C. Law 3-43, the repeal of which would revoke the building permit for the Metropolitan Square office buildings, were acting as private attorneys general in the face of unlawful inaction by the government. Petitioners seek the enforcement of the District of Columbia Home Rule Act, D.C. Code Section 1-233(a)(6) (1981) which specifically bars the local government from increasing building height limitations which were in effect at the time of the passage of the Home Rule Act.

This Court has recognized the importance of the role of "private attorneys general," who bring suits to implement and vindicate statutorily protected public interests. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 263, 95 S. Ct. 1612, 1624 (1975); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S. Ct. 814 (1971); *Newman v. Piggie Park Enterprise, Inc.,* 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968). Although the Court in *Alyeska* denied attorneys fees, it found that "[i]t is also apparent from our national experience that encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." *Alyeska,* 421 U.S. at 271, 95 S. Ct. at 1628. Petitioners in this suit are acting as "private attorneys general," just as respondents in *Alyeska* did; petitioners seek "to vindicate important statutory rights of all citizens" and to ensure "that the governmental system function[s] properly." *Alyeska,* 421 U.S. at 245, 94 S. Ct. at 1616.

The Home Rule Act, serves as the charter or constitution of the District of Columbia. Therefore, by violating the Home Rule Act's prohibition on changing the height limitations specified, the District of Columbia Council and Mayor Barry took an unconstitutional action and

acted outside the scope of their authority. The Council and Mayor usurped power from the federal government. In granting the United States government an exemption from the doctrine of laches, courts have recognized the importance of enforcing constitutions. "Acquiescence for no length of time can legalize a clear violation of duty where the people have plainly expressed their will in the Constitution and have appointed judicial tribunals to enforce it." *Asbury Park Press, Inc. v. Woolley,* 161 A.2d 705 (N.J. 1960). Because petitioners are acting in the place of the United States in this suit, they should be afforded the same exemption from the defense of laches, in order that the District of Columbia Home Rule Act is enforced and the citizens' rights and the public's interests are protected.

Courts also have disfavored the defense of laches as a bar to government enforcement of zoning laws, due to the public interest in zoning schemes. *Wieck v. District of Columbia Board of Zoning Adjustment,* 383 A.2d 7, 10 (D.C. 1978); *Goto v. District of Columbia Board of Zoning Adjustment,* 423 A.2d 917, 925 (D.C. 1980). As the capital of the United States, the District of Columbia is of special interest to all the people of the nation, which makes disfavor of the use of the doctrine of laches the more compelling. The unique character of the White House zones here affected has most recently been reaffirmed by this Court "as unique resources that the federal government holds in trust for the American people" in *Clark v. Community for Creative Nonviolence,* ____ U.S. ____, 104 S. Ct. 3065, 3067 (1984). *See also,* 16 U.S.C. § 1.

Because petitioners are acting in the place of the United States government to enforce and protect the public interest, the defense of laches should not have been permitted to bar their action, nor any like action in the future.

II. In order for a defendant to obtain equitable relief by application of the doctrine of laches in suits brought by "private attorneys general," a defendant should be required to prove affirmative misconduct on the part of a plaintiff litigating in the public interest.

In *United States v. Ruby Co., supra,* 588 F.2d at 703–4, the United States Court of Appeals for the Ninth Circuit found that if the traditional rule of the doctrine of laches were to evolve, as the traditional rule of the doctrine of equitable estoppel has evolved, it still would be necessary to require a showing of affirmative misconduct by the government in order for laches to bar a government suit to enforce a public right or protect a public interest. Because of the importance of litigation which seeks to enforce public rights or protect public interets, in such cases the application of the doctrine of laches should require a showing of affirmative misconduct by the citizen plaintiff acting as private attorney general. A showing of affirmative misconduct would be in addition to showing inexcusable delay in asserting a claim and showing the delay caused the defendant undue prejudice, the two prongs of the traditional test for laches.

Such an interpretation of the doctrine of laches is in keeping with the equitable principles underlying the doctrine. Courts have held that the time involved in the delay or neglect is not the principal factor considered. It is the weight of the delay causing prejudice and/or injury to the defendant by allowing the claim to go forward which constitutes the heart of laches. *Environmental Defense Fund v. Alexander,* 614 F.2d 474, 479 (5th Cir. 1980); *Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 843 (D.C. Cir. 1982); *Foundation on Economic Trends v. Heckler,* 587 F. Supp. 753, 756, affirmed in part, vacated in part, 756 F.2d 143 (D.C. Cir. 1984). Laches is "principally a question of the inequity of permitting the claim to be enforced," *Galliher*

v. Caldwell, 145 U.S. 368, 373 (1892), and therefore, the nature of the claim must be given weight, as well. More recently, a court has stated that "[w]hether or not the doctrine of laches bars an action depends upon the circumstances of that case and is a question primarily addressed to the discretion of the trial court." *Citizens Concerned about Trident v. Schlesinger,* 400 F. Supp. 454, 478 (D.C.D.C. 1975), case remanded 555 F.2d 817. Courts have recognized the importance of suits to enforce and protect public rights and interests by exempting the government from the bar of laches. This recognition should be extended to private plaintiffs, bringing the same kind of suit, if the defendant cannot show affirmative misconduct on the part of the plaintiff. Furthermore, if the doctrine of laches is too broadly applied, private citizen litigants will be discouraged from bringing lawsuits of this nature. Such a broad application would be in contradiction to the intent of the liberalized standing requirements. *See, e.g., Sierra Club v. Morton,* 405 U.S. 727 (1972); *United States v. S.C.R.A.P.,* 412 U.S. 669 (1973).

Respondents have not shown any affirmative misconduct by the petitioners. In this case, petitioners had assumed, as members of the public are entitled to do, *Environmental Defense Fund, supra,* at 479; *Save our Wetlands, Inc. v. United States Corp. of Engineers,* 549 F.2d 1021, 1027-8 (5th Cir. 1977), that government officials involved (the District of Columbia Council, the Department of the Interior, the National Capital Planning Commission and Mayor Barry) would act in accordance with the law and within their appropriate authority in protecting the public's interest. Furthermore, it was reasonable for petitioners to assume the federal government would protect federal interests with regard to the issue of building heights near the White House. But when the petitioners discovered the documents in October 1984, which showed the federal and District of Columbia officials were, in fact, negligent in

protecting the federal interest they almost immediately filed this suit on December 17, 1984.

Respondents asserted below that they were prejudiced by the delay in filing suit because they had acted in reliance on D.C. Law 3-43, and because they had incurred substantial costs. Petitioners did not know, at the time of the District of Columbia Council's amendment, that the amendment was illegal, nor did they know of Carr's proposed change in building heights (there was only media publicity regarding the buildings, not their height). It is significant that the Council held no public hearings of the proposed amendment and that NCPC never discussed the issue publicly or privately. However, respondents did know or should have known of the prohibition on building heights in the Home Rule Act, as well as of the interest in historic and aesthetic preservation of the White House Precinct. Respondents came in equity seeking the defense and relief of laches with unclean hands, which, in and of itself, should bar respondents from using an equitable defense. In the dissent of *Wieck, supra,* at 14, writing of the use of laches to prevent enforcement of zoning law, Judge Mack of the District of Columbia Court of Appeals wrote that "the only reliance which a landowner can show is reliance on nonenforcement of the law, which I suggest, is never justifiable." Nor was Carr's reliance justifiable, and it should not bar petitioners' suit.

Respondents have difficulty in demonstrating prejudice, as did defendants in *Committee to Stop Route 7 v. Volpe,* 346 F. Supp. 731, 739 (D. Conn. 1972). Carr's buildings have utility independent of the additional floors and height. Most of the expenses incurred on Phase I would have been incurred had the building been constructed to only the 95 foot height. Respondents' real losses are what must be balanced against the benefits of protecting and enforcing public rights and interests. Laches should not be applied to petitioners, a private party seeking to enforce and protect public rights and interests, because respondents have not shown any affirmative misconduct committed by petitioners.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 85-5649

CA No. 84-03824

[Filed: September 13, 1985]

Carrol Currie, *et al.*

v.

Marion S. Barry, Jr.,
Mayor, District of Columbia, *et al.*

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

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ORDER

The suggestion for rehearing *en banc* of appellant Carrol Currie, *et al.* has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam

FOR THE COURT
George A. Fisher, Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

September Term, 1984

No. 85-5649

C.A. No. 84-03824

[Filed: July 11, 1985]

Carrol Currie, *et al.,*
Appellants

v.

Marion S. Barry, Jr.,
Mayor, District of Columbia, *et al.*

BEFORE: Wright, Wald and Edwards, Circuit Judges

ORDER

Upon consideration of appellees' motion for summary affirmance, and the opposition and reply thereto, it is

ORDERED by the court that the motion is granted. The undisputed facts demonstrate beyond question that the district court did not abuse its discretion in finding that appellants were "guilty of unreasonable delay prejudicial to the [appellees]." *Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 843 (D.C. Cir. 1982). It is

FURTHER ORDERED by the court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-3824

[Filed: April 25, 1985]

Carol Currie, Kathryn A. Eckles and Anne Sellin,
Plaintiffs,

v.

Marion S. Barry, Jr., Mayor, District of Columbia, and District of Columbia,
Defendants,

v.

The Oliver T. Carr Company, as general partner of Square 224 Associates, and The Equitable Life Assurance Society of the United States, as a partner of Metropolitan Square Associates,
Intervenor Defendants.

MEMORANDUM ORDER

This action concerns the much debated, highly publicized construction of the twelve story Metropolitan Square office and retail building development, which occupies over two thirds of Square 224, the block across 15th Street from the Treasury Building in Washington, D.C.[1] The building is jointly owned by intervenor The

[1]The project has received considerable attention from the District of Columbia, interested federal agencies, historic preservation groups, and citizens, primarily because Square 224 was the site of three historic landmarks, known as the Keith-Albee Building, the National Metropolitan Bank Building and Rhodes Tavern.

Equitable Life Assurance Society of the United States and Square 224 Associates, a limited partnership of which intervenor, The Oliver T. Carr Company (Carr) is the general partner. The developer's plans call for construction of the single building in two phases. Phase I, which represents approximately two thirds of the building, was begun in December of 1980 and was completed in early 1983. The building permit for Phase II was issued in September of 1984 and excavation is currently underway.

The plaintiffs in this action are residents of the District of Columbia who challenge the legality of an amendment to the Schedule of Heights of Buildings Adjacent to Public Buildings, which was enacted by the District of Columbia Council in 1979, to permit the construction of a single building fronting on 14th, G and 15th Streets, N.W., to a height of 130 feet after a 35 foot setback from the 15th Street building line. D.C. Law 3-43, effective December 29, 1979.[2] The height change was part of an agreement between Carr and the District of Columbia, in return for which Carr agreed to preserve the facades of the historic Keith-Albee Building and the National Metropolitan Bank Building in the construction of Metropolitan Square. Prior to the amendment, for over sixty years, the height limitation on 15th Street, N.W., between Pennsylvania and G Streets across from the Treasury Building, had been 95 feet. This special district was established pursuant to the Act of June 1, 1910 by the D.C. Commissioners, and is one of four such districts within the White House Precinct. Complaint, Ex. B, pp. 2-3. Plaintiffs contend that the District of Columbia was without authority to amend the Schedule of Heights and to permit the construction of Metropolitan Square in excess of 95 feet because the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), D.C. Code § 1-233(a)(6) (1981), bars

[2]The actual setback of Metropolitan Square was later changed to 47 feet upon the recommendation of the Federal Commission of Fine Arts.

the local government from regulating height limitations in this area. Plaintiffs seek a declaration that the enactment of the "Schedule of Heights Amendment Act of 1979" by the defendants was unlawful and is therefore void, an order requiring the defendants to compel the owners of Metropolitan Square to remove the portion of Phase I fronting on 15th Street which stand in excess of 95 feet, and an order requiring defendants to rescind and modify the construction permit for Phase II, to allow the construction of a building fronting on 15th Street no higher than 95 feet.

This matter is before us on defendant intervenors' motion to dismiss or for summary judgment, which defendants incorporate and adopt, and on plaintiffs' motion for summary judgment.

Discussion

The intervenors challenge the standing of plaintiffs to bring this action and raise the doctrine of laches in defense to the complaint. Because we agree that the action is barred by laches, we do not reach the question of the D.C. Council's authority to amend the "Schedule of Heights."

Standing

The principles governing standing are set forth in numerous Supreme Court decisions and are well summarized in *Warth v. Seldin*, 422 U.S. 490, 498-502 (1975). Our jurisdiction extends to "cases and controversies" and can be invoked only when a plaintiff has suffered some actual or threatened injury from the allegedly illegal action. Plaintiffs assert such "injury" in two respects. First, they assert that the excess height of Metropolitan Square, which overlooks the White House, interferes with the security and privacy of the President and results in increased tax expenditures for Presidential security. The intervenors argue that with respect to the White House

security, plaintiffs claim injury merely as citizen taxpayers, which is insufficient to confer standing. We agree that plaintiffs raise no more than a generalized grievance respecting the security and privacy of the President and that these allegations alone would not permit a finding of standing. *See Schlesinger v. Reservists to Stop the War,* 418 U.S. 208 (1974); *United States v. Richardson,* 418 U.S. 166 (1974).

Second, the plaintiffs also allege that their individual aesthetic, environmental, and recreational use of the White House Precinct and the area around the Treasury is adversely impacted by the presence of Metropolitan Square, which "overwhelms the buildings within the White House Precinct." These alleged injuries fall squarely within the scope of noneconomic interest which may properly be invoked to establish injury in fact. *See Sierra Club v. Morton,* 405 U.S. 727, 734 (1972); *United States v. S.C.R.A.P.,* 412 U.S. 669, 686 (1973). That plaintiffs' interest is in protecting a historic, urban environment rather than a wilderness area or natural resource does not alter this analysis. The intervenors characterize the plaintiffs' alleged injuries as "extremely subjective," "marginal" or "only an aesthetic perception." While we are inclined to agree that plaintiffs' actual injuries appear quite minimal, we are mindful that standing does not depend upon the magnitude of the injury alleged. Indeed, the Supreme Court has emphasized that standing is not to be limited to those who claim to be "significantly affected" by government action. *S.C.R.A.P.,* 412 U.S. at 689 n.14. This issue is not free of doubt, particularly when one considers the prudential limitations on our exercise of jurisdiction. For the purpose of this case, we hold that the plaintiffs have identified a sufficiently dis-

tinct injury to satisfy the requirement of injury in fact[3] and, therefore, have standing to maintain this action.

Laches

We turn now to the question of whether plaintiffs' claim is barred by the equitable doctrine of laches. To establish a laches defense, the defendants and intervenors must show that the plaintiffs delayed unreasonably in bringing the suit resulting in prejudice to the defendants or intervenors. *Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 843 (D.C. Cir. 1982).

Plaintiffs offer no explanation for their failure to instigate suit or otherwise oppose the excess height of Metropolitan Square until after the construction of Phase I. They argue only that they are non-lawyers and were reasonably entitled to assume that the Council of the District of Columbia would act in accordance with the law. Laches, however, "does not depend upon the subjective awareness of the legal basis on which a claim can be made." *Environmental Defense Fund v. Alexander,* 614 F.2d 474, 479 (5th Cir.) *cert. denied,* 449 U.S. 919 (1980). Furthermore, the plaintiffs were aware in 1979 and 1980 of the amendment of the height limit to accommodate Metropolitan Square, which action was taken in exchange for Carr's agreement to preserve the facades of the Keith-Albee and National Metropolitan Bank Buildings. Especially in light of the publicity which this development project has received, we have no difficulty in determining that the plaintiffs' delay in instituting this suit was unreasonable.

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[3]Neither party addresses the question whether plaintiffs' injuries are "arguably within the zone of interests" to be protected by the relevant statute. We note, however, that aesthetic or environmental interests in the heights of buildings are obviously within the zone of interest intended to be protected by the Home Rule Act which explicitly limited the power of the local government to regulate certain, if not all, building heights within the nation's capital. D.C. Code § 1-233(a)(6).

We also find that plaintiffs' delay resulted in substantial prejudice to the defendants. Construction of Phase I began in December of 1980 and finished in January of 1983, with the exception of a planned glass-covered atrium which cannot be completed until Phase II is built. Reduction of the height of the building from 130 feet to 95 feet would entail the removal of Floors 10, 11 and 12 and would render the ninth floor useless as office space. Each of these floors is currently under lease for an initial term of 15 years, with options to lease the corresponding floors in Phase II. These leases include a right of termination in the event that the corresponding Phase II floors are not completed by a certain date. Affidavit of Arthur P. Hanket. Obviously, defendants would incur substantial costs if they were now required to remove the top 35 feet of Phase I.

The construction on Phase II has not yet commenced, but the intervenors have taken steps in reliance upon its being built as a matched structure connected with Phase I. Limiting the Phase II construction to 95 feet would result in losses from changing the Metropolitan Square development plans, reduction in net income from the project, and potential losses associated with all leases from eliminating the planned atrium and from the possibility that the Phase I tenants on Floors 9 through 12 would exercise their rights to terminate their leases. Additionally, the intervenors point out that they have already incurred the expense of preserving the facades of the Keith-Albee Building in constructing Phase I and of the National Metropolitan Bank Building in preparing for the construction of Phase II. In agreeing to preserve these facades, Carr relied upon the enactment of the amendment to the Schedule of Heights in projecting net income from Metropolitan Square. Affidavit of Hanket. It would be inequitable, indeed, to prevent the intervenors from receiving the benefit of their agreement with the District of Columbia after they have substantially performed their own obligation.

Plaintiffs, in response, argue that intervenors are not prejudiced because they can sue the District of Columbia for the costs associated with the excessive construction. This argument is not persuasive because, *inter alia,* it overlooks the fact that the costs would not have been incurred in the first instance had plaintiffs successfully challenged defendants before the construction of Metropolitan Square was underway. The fact that the intervenors, at some future date, may be able to shift some or all of their costs to the taxpayers of the District of Columbia does not eliminate or lessen the overall prejudice caused by the plaintiffs' delay. We conclude that the plaintiffs' claim for relief is barred by laches.

Based on the foregoing, and there being no genuine issue of material fact, it is by the court this 24th day of April, 1985,

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED that defendants' and intervenors' motion for summary judgment be and the same hereby is granted and that this action stands dismissed with prejudice.

/s/ JOHN H. PRATT
United States District Judge